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Federal Communications Commission  
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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**COMMENTS OF PAGING NETWORK, INC.**

Respectfully submitted,

**PAGING NETWORK, INC.**

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## Summary

Paging Network, Inc. ("PageNet") hereby comments on the Further Notice of Proposed Rulemaking in the Future Development of Paging Systems proceeding ("NPRM"). PageNet is the largest U.S. messaging carrier and the licensee of nationwide private carrier paging ("PCP") systems.

Because the nationwide PCP licensees already hold nationwide licenses, the Commission should not impose additional construction requirements, such as coverage requirements, on nationwide PCP licensees. Pursuant to 47 C.F.R. § 90.495(a)(3), the carriers that were able to build a qualifying system were awarded nationwide exclusivity. The nature of their exclusivity provides them with a nationwide license, which additional construction requirements cannot diminish or defeat.

Moreover, PageNet already serves over 600,000 customers on its nationwide systems and has spent approximately 150 million dollars on the build-out of facilities on its nationwide exclusive channels. It would be damaging and harmful to PageNet and other nationwide carriers to terminate nationwide licenses based upon a new set of construction requirements when such a substantial investment has already been made.

The notion of parity has apparently caused the Commission to consider whether nationwide licenses should be subject to additional coverage requirements. PageNet does not see any distinction between build-out requirements based upon construction of a specific number of transmitters and those based upon population coverage. Under both, the licensee is required to build-out a minimum number of transmitters. As such, the nationwide PCP licensees have already been subject to coverage requirements that are essentially equivalent to the coverage requirements of the MTA and other geographic licensees.

By proposing to impose additional construction requirements on nationwide PCP licensees, the Commission is contemplating taking a portion of the economic benefit upon which the licensee have relied. As such, upon implementation of new construction requirements for nationwide PCP licensees, the Commission will engage in an unlawful "taking" of property for which it lacks authority or, in any case, would face an obligation to pay just compensation pursuant to the Fifth Amendment of the United States Constitution. It is not hard to imagine that, after spending hundreds of millions of dollars in the construction and operation of nationwide PCP systems and after having fulfilled the Commission-imposed exclusivity requirements, PageNet and all of the other nationwide PCP carriers would have an investment-backed expectation that they would be able to retain the scope of their earned nationwide licenses. If any nationwide PCP licensee lost

its license as a result of newly-imposed coverage or other construction requirements or lost the ability to expand its systems, such licensee would have a cause of action against the Commission on the grounds that the modification of the rights the licensees had earned under their license was a taking under the Fifth Amendment of the Constitution of the United States.

At this time, PageNet opposes allowing licensees to disaggregate their 25 kHz base station spectrum. Paging spectrum is already extremely scarce and, compared to other services, the RF allocation to the entire paging industry is small. Allowing the break-up of very small portions of spectrum that are dedicated to one of the most widely used services in wireless is simply unnecessary and would ultimately limit the ability of the public to receive traditional messaging services on paging channels.

Because partitioning could lead to abuse during and after the auction, the Commission should not allow partitioning except for good cause shown on a waiver basis until after the geographic licensee has met the second construction benchmark. The ability permissibly partition may encourage bidders in the auction to have unlawful contact with other bidders and may be used to avoid the geographic license build-out requirements. Partitioning either by waiver for good cause shown or after the construction requirements have been met for the entire MTA will provide licensees flexibility without creating incentives to circumvent the auction and/or construction rules.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Revision of Part 22 and Part 90	)	WT Docket No. 96-18
of the Commission's Rules to	)	
Facilitate Future Development	)	
of Paging Systems	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act --	)	
Competitive Bidding	)	
To: The Commission		

**COMMENTS OF PAGING NETWORK, INC.**

Paging Network, Inc. ("PageNet"), by its attorneys and pursuant to 47 C.F.R. §§ 1.415 & 1.419, hereby comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding released on February 24, 1997 ("NPRM").<sup>1</sup> In support hereof, the following is respectfully shown:

**I. Statement Of Interest**

PageNet, through its subsidiaries, is the largest U.S. messaging carrier, serving over nine million mobile units. PageNet is the licensee of nationwide private carrier paging ("PCP") licenses as well as hundreds of other 929 MHz and 931 MHz licenses and is eminently qualified to comment on the NPRM.

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<sup>1</sup> In the Matter of Revision of Part 22 and 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Second Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-18, released February 24, 1997 ("NPRM").

## **II. The Commission Should Not Adopt Additional Construction Requirements For Nationwide PCP Licenses**

### **A. Nationwide PCP Licensees Already Hold Nationwide Licenses**

In the *NPRM*, the Commission sought comment on whether it should impose additional construction requirements on nationwide geographic licensees.<sup>2</sup> Specifically, noting that other geographic licensees will be subject to population coverage requirements, the Commission sought comment as to whether it should impose population coverage requirements on nationwide licensees.<sup>3</sup> Because the nationwide PCP licensees already hold nationwide licenses, the Commission should not impose additional construction requirements, such as coverage requirements, on nationwide PCP licensees.

In *Private Carrier Paging Systems at 929-930 MHz (Channel Exclusivity)*, 74 RR2d 131 (1993), the Commission established the criteria for achieving exclusivity on a nationwide basis. This criteria, codified under 47 C.F.R. § 90.495(a)(3),<sup>4</sup> required the applicant to place in operation 300 transmitters that provided service in 50 of the markets listed in Section 90.741, including 25 of the top 50 markets, and two markets in each of the seven Bell regions.<sup>5</sup> This construction had to be completed within

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<sup>2</sup> *NPRM* at ¶ 202.

<sup>3</sup> *Id.*

<sup>4</sup> Unless reconsidered, this rule section will be removed from the Commission's Rules on May 12, 1997.

<sup>5</sup> 47 C.F.R. § 90.495(a)(3).

eight months of licensing of the system.<sup>6</sup> Those carriers that were able to build a qualifying system were awarded nationwide exclusivity. Because nationwide PCP carriers are the only carriers eligible for future licensing on their respective nationwide channels under 47 C.F.R. § 90.495(a)(3) of the Commission's Rules, the nature of their exclusivity provides them with a nationwide license, which additional construction requirements cannot diminish or defeat.

Inherent in an inquiry as to whether additional construction requirements should be placed on the nationwide PCP licensees is the notion that, if the nationwide licensees do not meet the additional construction requirements, they would lose their nationwide licenses. In PageNet's case, PageNet already serves over 600,000 nationwide customers on its nationwide systems and has spent over 100 million dollars on the build-out of facilities on its nationwide exclusive channels. It would be seriously damaging and harmful to PageNet and other nationwide carriers to terminate nationwide licenses based upon a new set of construction requirements when such a substantial investment has already been made.

Moreover, if the Commission did terminate nationwide PCP licenses for failure to meet newly imposed construction and

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<sup>6</sup> If the Commission wished to achieve construction parity between the nationwide PCP licensees and MTA and other non-nationwide geographic systems, the MTA and other non-nationwide geographic licensees should be required to meet their construction requirements in eight months as the nationwide PCP licensees did.

coverage requirements, the Commission will be restricting the ability of nationwide carriers to expand the nationwide systems in response to customer requirements. Selling the white space reverted from a terminated nationwide license to a third party at auction will mean that the nationwide systems are locked in place and may never expand. When a carrier is locked into its current service contours, so is the customer. There is no compelling reason to subject the licensees of nationwide systems to termination based upon the imposition of new construction and coverage requirements, particularly when this would ultimately lead to the inability of the public to receive nationwide communications services.

The notion of parity has apparently caused the Commission to consider whether nationwide licenses should be subject to additional coverage requirements. Like the terms "exclusive" and "geographic" when applied to nationwide PCP licenses, PageNet does not see any distinction between build-out requirements based upon construction of a specific number of transmitters and those based upon population coverage. Under both, the licensee is required to build-out a minimum number of transmitters. In fact, the very basis for the award of the nationwide PCP licenses was the service area coverage provided by the minimum 300 transmitters the nationwide licensees initially employed in their systems. As such, parity considered, the nationwide PCP licensees have already been subject to coverage requirements that



are essentially equivalent to the coverage requirements of the MTA and other geographic licensees.

**B. Adoption Of New Construction Requirements For Nationwide PCP Licensees Would Be An Unlawful Taking**

The threshold question here is whether it is a proper exercise of the Commission's authority to alter the nationwide licenses to the detriment of the nationwide licensee. By proposing to impose additional construction requirements on nationwide PCP licensees, the Commission is contemplating taking a portion of the economic benefit upon which the licensee has relied. As such, upon implementation of new construction requirements for nationwide PCP licensees, the Commission would engage in an unlawful "taking" of property for which it lacks authority or, in any case, would face an obligation to pay just compensation pursuant to the Fifth Amendment of the United States Constitution.

In determining whether a federal agency action qualifies as a "taking" forbidden by the Fifth Amendment, the Supreme Court has primarily relied on *ad hoc* factual inquiries into the circumstances of each case.<sup>7</sup> The Court has increasingly looked to three factors as being of particular significance:<sup>8</sup>

1. The extent to which regulation has interfered with distinct investment-backed expectations;
2. The character of the government action; and

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<sup>7</sup> See e.g., *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1026 (1986).

<sup>8</sup> *Id.*

3. The economic impact of the regulation on the claimant. As demonstrated below, a review of these factors with respect to the imposition of new construction requirements on the nationwide PCP licensees would qualify as a compensable taking.

Interference with distinct investment-backed expectations. Additional construction requirements imposed upon the nationwide licensees will interfere with PageNet's investment-backed expectations regarding its nationwide PCP licenses.<sup>9</sup> In investing more than 100 million dollars in the construction of its nationwide systems, PageNet's expectation was that if it met the requirements for nationwide exclusivity, it would have the right to construct and operate facilities on the subject nationwide channel anywhere in the United States without any additional licensing by third parties. These investment-backed expectations would be thwarted by the Commission's imposition of additional construction requirements and such requirements may lead to the loss of the nationwide license of which the licensee was already fully possessed. PageNet and other carriers have acted in reliance on the terms of their licenses, as originally issued pursuant to Section 90.495 of the Commission's Rules, to invest in the design, construction, operation and expansion of nationwide PCP systems to provide service to the public. Because

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<sup>9</sup> It has long been recognized that governmental licenses to pursue lines of business qualify as "private property" for the purpose of the taking clause of the Fifth Amendment. See e.g., *Jackson v. United States*, 103 F.Supp. 1019 (Ct. Cl. 1952) (federal government abrogation of commercial fishing license).

PageNet has met all of the conditions of its original nationwide exclusive licenses, the Commission cannot now reduce PageNet's rights under its nationwide licenses without incurring an obligation for the reduced value of PageNet's investment.

The character of the government action. The Supreme Court has held that an unconstitutional taking may more readily be found when the interference with property "can be characterized as a physical invasion" by the government.<sup>10</sup> In such cases, the governmental action represents more than "interference" which "arises from some public program adjusting the benefits and burden of economic life to promote the common good."<sup>11</sup> When the effect of the governmental regulation is physical intrusion that reaches the extreme form of a permanent occupation, a taking has occurred. In such cases, the character of the government's action becomes "determinative" of whether a taking has occurred.<sup>12</sup> Moreover, the government's invasion of interest in property, other than full ownership, such as an easement, can also give rise to an unconstitutional taking.<sup>13</sup>

These principles have full applicability here, where newly imposed coverage requirements would effect a diminution in the scope of the nationwide licenses. The Fifth Amendment's

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<sup>10</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S.Ct. 3164, 3171 (1982).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Kaiser Aetna v. United States*, 100 S.Ct. 383, 393 (1979).

guarantee that private property not be taken for public use without just compensation is designed to bar the government from forcing some people to assume burdens that should be borne by the public as a whole.<sup>14</sup> Additional coverage requirements that, if not met, would mean the loss of the nationwide license, would do just that because the Commission would recover white space from these nationwide licensees to auction in the future. The Commission should not attempt to secure a public financial benefit at the expense of individual licensees who have relied in good faith on the Commission's prior rules and have made an investment decision on the basis of the existing terms of their licenses. This is particularly so when the government will harm the public interest by restricting the public's ability to receive highly quality nationwide paging services.

The "economic harm" to PageNet. PageNet has proceeded diligently to construct its nationwide facilities in reliance upon Section 90.495 of the Commission's Rules. If the Commission adopts additional nationwide coverage requirements, it will circumscribe the area in which PageNet understood it had exclusive rights to provide service. It is certainly not hard to imagine that, after spending hundreds of millions of dollars in the construction and operation of nationwide PCP systems and after having fulfilled the Commission-imposed exclusivity requirements, PageNet and all of the other nationwide PCP carriers would have an investment-backed expectation that they

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<sup>14</sup> *Armstrong v. United States*, 80 S.Ct. 1563, 1569 (1960).

would be able to retain the scope of their earned nationwide licenses. The scope of the license included that ability to continue to build-out nationwide facilities even after the minimum construction threshold was met. If any nationwide PCP licensee lost its license as a result of newly imposed coverage or other construction requirements or lost the ability to expand its systems, such licensee would have a cause of action against the Commission on the grounds that the modification of the rights the licensees had earned under their licenses was a taking under the Fifth Amendment of the Constitution of the United States.

**C. The Nationwide PCP Licensees Were Not Aware When They Committed To Build-Out Their Systems That The Inability To Cover A Percentage Of The Nation's Population May Cause Them To Lose Their Nationwide Licenses**

Unlike the nationwide 931 MHz common carrier spectrum, the PCP spectrum was not clear of incumbent users when the nationwide licensees acquired exclusivity. In high population areas, incumbent exclusive licensees may block the nationwide licensees from serving that area. (Remember, the nationwide PCP licensee only had to cover 25 of the 50 top markets.) The level of non-nationwide incumbent exclusive systems will vary for each nationwide channel. As such, even among PCP licensees, there are differences with respect to how much population coverage the nationwide licensees are able to achieve. Because of these differences, some nationwide licensees may be able to meet additional population-based coverage requirements and others may not. Yet, these carriers, at the minimum, made similar investments to construct systems that qualified for exclusivity

under the PCP rules. As such, there does not seem to be an adequate basis to discriminate among these nationwide existing licensees by the imposition of population coverage requirements.

If the Commission perceives that the construction requirements between the nationwide PCP geographic licenses and the MTA geographic licenses are significantly different, these perceived differences cannot be cured by grafting additional construction requirements onto nationwide licensees. For one, these licensees already hold nationwide licenses. The Commission has no basis to diminish the scope of these licenses. Secondly, the MTA and other geographic licensees will know prior to participating in the auction that they will have to buy out an incumbent or incumbents in order to meet the construction requirements and retain certain geographic licenses acquired at the auction.

The nationwide PCP licensees did not have this opportunity. Nationwide PCP licensees did not assume the risk that they could not meet construction requirements that would be grafted over them after they have invested hundreds of millions of dollars in their nationwide systems. As such, the imposition of population-based construction and coverage requirements on the nationwide PCP licensees does not establish parity between nationwide and MTA geographic licensees. Rather, it creates a significant inequity between the nationwide PCP licenses and MTA and other geographic licenses.

### **III. The Commission Should Not Allow Disaggregation Of Paging Base Channels**

In the *NPRM*, the Commission sought comment on whether paging carriers should be allowed to disaggregate their spectrum.<sup>15</sup> Essentially, this question asks whether the Commission should allow a carrier to break up and assign to other parties a portion of the 25 kHz base paging channel. PageNet is unaware of any technology designed for 900 MHz paging channels that uses less than 25 kHz. As such, the Commission's inquiry into disaggregation of paging channels is premature.

At this time, PageNet opposes allowing licensees to disaggregate their 25 kHz base station spectrum. Paging spectrum is already extremely scarce and, compared to other services, the RF allocation to the entire paging industry is small. A single broadband PCS licensee or a cellular licensee holds more aggregate spectrum than all of the paging licensees put together. Allowing the break-up of very small portions of spectrum that are dedicated to one of the most widely used services in wireless is simply unnecessary and would ultimately limit the ability of the public to receive traditional messaging services on paging channels.

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<sup>15</sup> *NPRM* at ¶ 203.

#### **IV. Partitioning Should Be Allowed Only On A Waiver Basis Or Only After The Geographic Licensee Has Met The Second Construction Benchmark**

The NPRM also sought comment as to whether licensees should have the ability to partition their licenses.<sup>16</sup> Because partitioning could lead to abuse during and after the auction, the Commission should not allow partitioning except for good cause shown on a waiver basis until after the geographic licensee has met the second construction benchmark. Specifically, because it is the nature of business to seek compromise, the ability to partition may encourage bidders in the auction to have unlawful contact with other bidders, particularly if the market is highly contested. In addition, if partitioning alleviated the responsibility to build-out under the geographic license construction requirements, partitioning may be used to avoid loss of an entire MTA license because the licensee can simply partition to a straw man that portion of the geographic license within which it did not build or cover the necessary population. As such, partitioning either by waiver for good cause shown or after the construction requirements have been met for the entire MTA will provide licensees flexibility without creating incentives to circumvent the auction and/or construction rules.

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<sup>16</sup>

*Id.*



## V. Conclusion

There is no question that nationwide PCP licensees hold geographic licenses, which were earned pursuant to Section 90.495 of the Commission's Rules. To change this would be extremely unfair to nationwide PCP licensees, would not achieve parity because nationwide PCP licensees were subject to coverage requirements that are essentially equivalent to the MTA geographic licensees, and would be considered a taking under the Fifth Amendment of the Constitution.

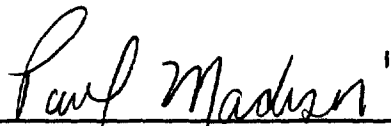
The Commission should not adopt a rule allowing disaggregation at this time because the allocation of paging spectrum is comparatively small. Disaggregation at this time may diminish the spectrum that is primarily available for messaging. Moreover, because permissive partitioning may encourage auction and construction abuses, the Commission should not allow partitioning, except on a waiver basis for good cause shown or until the MTA licensee has met the maximum build-out requirement.

**WHEREFORE**, for the foregoing reasons, PageNet requests that the Commission adopt rules in accordance with the comments herein presented.

Respectfully submitted,

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